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Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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1. The Government's brief in opposition to certiorari seeks to obscure the existence of a three-way conflict in the Circuits concerning the procedural rights available to a Selective Service registrant who claims conscientious objector classification after an order to report, but before induction. The three prevailing and conflicting standards are as follows:

(a) The *Underwood*[1] rule applied uniformly in the Third Circuit: registrant entitled to full procedural rights including reopening, personal appearance, and appeal, if claim made at any time prior to induction.

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[1] Citations on pp. 14-15 of Petition.

(b) The *Boyd*[2] rule, which is followed in the Ninth and other Circuits: a post-order to report claim will not be recognized.

(c) The *Gearey* rule, announced by the Second Circuit in this case: a post-order to report claim cannot be denied exclusively because of lateness, but the registrant making such a claim has no procedural rights whatsoever beyond the right to have his late claim "considered" by the local board.

The *Gearey* case indeed laid down a "new guideline" to be followed in the Second Circuit. See *United States* v. *Fargas*, 267 F. Supp. 452, 456 (S. D. N. Y. 1967). Petitioner argues that the guideline is insufficient since there can be no realization of the substantive rights granted without the corresponding procedural guarantees. Therefore, petitioner urges that the Third Circuit rule should be adopted.

But the Government seems to argue that there is no difference between the *Gearey* rule and the *Boyd* rule. Brief in Opposition, p. 14. That this argument is untenable is evident from the very words of the decisions cited on page 14 of the brief in opposition.[3]

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[2] Citations in Government's Brief in Opposition, p. 14. The Court below in *Gearey I* recognized that it was ruling contrary to certain other Circuits. 368 F. 2d at 150, fn. 13, Petition, App., p. 33a.

[3] Most of the cases cited by the Government as supporting *Gearey* are indeed repudiated by *Gearey*. ". . . no request for reopening and reclassification shall be entertained after notice to report for induction is mailed." *Keene* v. *United States*, 266 F. 2d 378, 384 (10th Cir. 1959); ". . . a claim of conscientious objector status must be made before the individual concerned has been notified to report for induction." *United States* v. *Taylor*, 351 F. 2d 228, 236 (6th Cir. 1965); "Belated development of conscientious objection is not a change in status beyond the control of registrant."; *Davis* v. *United States*, 374 F. 2d 1, 4 (5th Cir. 1967);

The Government's effort to force the *Gearey* case into the *Boyd* mold is unpersuasive. There is in fact a three-way conflict. In addition, several of the Circuits have not yet announced a rule. Particularly in the light of the frequently recurring event of registrants from one state being ordered to report for induction in another, the absence of a uniform national rule creates a question of considerable public importance which only this Court can resolve.

2. The brief in opposition contends that there is no merit to petitioner's argument that where administrative review is not provided, judicial review should be broader than the traditional "rational basis in fact" standard. Page 15, footnote 7. That there is indeed merit to this argument is demonstrated by the first reported decision in the Second Circuit which sought to apply *Gearey*. Judge Bryan of the Southern District of New York, in *United States* v. *Fargas*, *supra*, analyzing the impact of the *Gearey* rule, held:

> "In order to determine the validity of the defense which Fargas now seeks to raise, it will be necessary to explore fully all of the facts and circumstances bearing on the board's action to determine whether such action as the board has already taken has a basis in fact when measured by the new guideline laid down in Gearey." 267 F. Supp. at 456.[4]

"Belated development of conscientious objection is not such a change in status beyond the control of a registrant." *United States* v. *Muhammad*, 364 F. 2d 223, 224 (4th Cir. 1966). Furthermore, the Ninth Circuit, in a post-Gearey case cited by the Government, *Parrott* v. *United States*, 370 F. 2d 388, 395 (1966), cert. den. sub nom., *Lawrence* v. *United States*, 387 U. S. 908 has in turn repudiated *Gearey*. Thus, the inter-Circuit conflict can hardly be clearer.

[4] The restatement of the traditional rational basis in fact rule by this Court in *United States* v. *Seeger*, 380 U. S. 163, 185 (1965)

3. The brief in opposition (p. 16) seeks to distinguish *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (3d Cir. 1953) which stands for the proposition that the presentation of a non-frivolous claim, even after an order to report for induction, compels reopening and reconsideration, and consequently, the accompanying procedural rights. The Government thereby appears to concede that the Court below erred in its broad statement that none of the cases cited to it below supported this view. See Petition, p. 21, footnote 32. The Government admits that the *Berman* case stands for the proposition asserted by petitioner, but then tries to distinguish it. The distinction fails because petitioner's claim herein was just as timely as Berman's; and according to the very holding of the Court below, a change in status by reason of post-induction maturation of conscientious objector views is just as much a change in status as that caused by admittance to a recognized theological school.

4. The lengthy statement of the case in the brief in opposition contains a number of inaccurate statements. It is probably not appropriate to use a reply brief to respond to each and every one of the extracontextual allegations

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was linked to a recitation of the procedural rights available to conscientious objector registrants. This petition should be granted to determine whether or not a late registrant such as petitioner, is to be denied the rights which this Court reiterated in 1965—the last time it has spoken on conscientious objection—as being available to conscientious objectors generally.

Moreover, a recent and as yet unreported decision of the Ninth Circuit, *Wills* v. *United States*, —— F. 2d ——, No. 21378, Oct. 3, 1967, has held that as a "consequence" of a registrant losing "the opportunity to secure administrative review of his constitutional claim", he was entitled to judicial review on the merits, *Wills* v. *United States*, Pet. for Cert., p. A-6.

recited as "fact" in the Government's statement of the case. However, a few of these will be noted in the margin.[5]

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[5] (a) It is stated (Brief in Opp., pp. 8-9) that petitioner told the officer in charge of the induction station that his refusal to submit to induction was because of pending employment as a teacher and disagreement with foreign policy, and thereby clearly implied that the petitioner stated nothing about conscientious objection at this crucial moment. Yet the record shows that the officer in charge admitted on cross-examination that there was considerable discussion between him and petitioner about conscientious objection. I R. 41a-43a, 46a. Moreover, the FBI agent who arrested petitioner at the induction station testified that at the time of the arrest "he told me the reason for this was an inner conviction of his that he could not take the life of another man." I R. 45a.

(b) It is stated (p. 10) that petitioner refused to answer certain questions for "personal reasons". It is true that Board Member Hatterschied so testified at the hearing. But Chairman Barbiere did not recall any such refusal, III R. 120; and Member Elmezzi testified that he answered all questions, and did not recall any refusal, III R. 189. Petitioner was not permitted to testify at the hearing, and he was therefore unable to attempt to rebut this attack on his sincerity. See Petition, pp. 28-30.

(c) It is implied (p. 10) that petitioner's insincerity was manifested in his stating to the Board, in response to a question about his religion, that he followed no religion, after having previously written the Board a letter stating that he was a Catholic. But, in that same letter, petitioner had explained that while he was committed to "the spirit and teachings" he was not in agreement with all the "external formulae" of Catholicism. I R. 94a. Moreover, the Board Chairman testified explicitly that no members of the Board asked petitioner any questions about his religious affiliation. III R. 110.

(d) It is stated (p. 11) that the Board "decided that there has been no crystallization". No Board member used either the word "crystallization", or any reasonable synonym thereof. Indeed, in response to direct questions, all three testified that there was no discussion whatsoever of this concept. III R. 27, 28, 34, 36, 39, 46, 49 (Hatterschied testimony); 106, 107, 125, 126, 131, 134 (Barbiere testimony); 175, 176 (Elmezzi testimony).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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